1953

Frances H. Bowen v. Culbert L. Olson : Brief of Appellants

Utah Supreme Court

George R. Stanley; Colton & Hammond; Attorneys for Plaintiffs and Cross-Defendants and Appellants;

IN THE SUPREME COURT
of the
STATE OF UTAH

FRANCES H. BOWEN, Administratrix of the Estate of J. PARRY BOWEN, et al.,

Plaintiffs and Appellants,

vs.

CULBERT L. OLSON,

Defendant and Respondent.

* * * * *

CULBERT L. OLSON,

Cross-Complainant and Respondent,

vs.

FRANCES H. BOWEN, Administratrix of the Estate of J. PARRY BOWEN, et al.,

Cross-Defendants and Appellants.

Case No. 8060

APPELLANTS' BRIEF

GEORGE B. STANLEY
COLTON & HAMMOND

Attorneys for Plaintiffs Cross-Defendants and Appellants.

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PREFACE

In this appeal the question is not one of the facts found by the Lower Court in his Memorandum Decision (Rec. 63-86), but rather that the Lower Court erred in construing the law as applied to those facts in the following particulars:

1. In interpreting the facts shown in his Memorandum

Decision (Rec. 63-86) into his Findings of Fact (Rec. 97-102).

2. That the conclusions of law, and decree are clearly against both the law, and the evidence as found in said Memorandum Decision.

The facts are not disputed only in a few very minor particulars as they are set forth in said Memorandum Decision and in such instances they are pointed out. Except as hereinafter pointed out, the facts as set forth in said Memorandum Decision are referred to as controlling in this brief. However, appellants do not accept any conclusions of law that may be made by the lower court on the legal effect of the failure to pay the 1947 and 1948 taxes before they became delinquent on November 30th of each respective year, nor the legal conclusions that such failure terminated the adverse possession of the plaintiffs.

FACTS

This action was commenced by the filing of a complaint (Rec. 1-6) on September 22, 1948. The complaint was in the so-called "short form" and did not allege adverse possession or the payment of taxes. A considerable amount of land was involved other than the 80 acres of land involved in this action and appeal, and described as the North half of the Southwest quarter of Section 34, in Township 1 South of Range 1 East of the Uintah Special Meridian. The plaintiff, J. Parry Bowen also known as J. Perry Bowen, has died since the commencement of the action, and Fran-

ces H. Bowen, Administratrix of the Estate of J. Parry Bowen, Deceased, has been substituted as a party plaintiff. However, at the time of the commencement of this action, J. Parry Bowen had no interest in the lands involved in this appeal, he having conveyed all of his right, title and interest in the lands to Keith J. Bowen on April 26th, 1947 (Plaintiffs' Exhibit J, page 55).

The defendant and respondent, Culbert L. Olson, filed an "Answer" (Rec. 7-8) which is verified on October 21st, 1949 but bears no filing date. In this purported answer, the defendant makes no claim whatsoever to any particular piece of the property involved in the action by definitely describing the same. He makes no affirmative allegations claiming ownership of the subject property.

On January 9th, 1950, defendant and appellant, Culbert L. Olson, filed a "Cross-Complaint" (Rec. 17-20), which was followed by his "FIRST AMENDED CROSS-COMPLAINT" (Rec. 21-25), filed March 31st, 1950; his "SECOND AMENDED CROSS-COMPLAINT" (Rec. 26-30) filed April 27th, 1950; his "THIRD AMENDED CROSS-COMPLAINT" (Rec. 31-36), filed April 28th, 1950; and his "CROSS-COMPLAINT of Defendant CULBERT L. OLSON, Amending and Replacing His Third Amended Cross-Complaint (Rec. 43-50). Cross-Complainant Olson made his first claim of ownership and possession of the subject land in his first Cross-Complaint, and prayed for a judgment quieting his title to that particular land for the first time. His succeeding cross-complaints likewise prayed that his title be quieted

although they changed their substance.

On April 21st, 1950, defendant Olson filed his "AMENDED ANSWER OF CULBERT L. OLSON" (Rec. 12-14) in which he made a counter-claim for the first time and in which he alleged ownership and possession and the necessary requisites for a short form in an action to quiet title. He prayed that his title be quited to the subject lands.

On April 3rd, 1950, in their "ANSWER TO FIRST AMENDED CROSS-COMPLAINT", the plaintiffs and cross-defendants alleged the necessary requisites of adverse possession and that they "have paid all taxes and assessments levied or assessed thereon during said period."

In all subsequent pleadings of the plaintiffs and cross-defendants, namely: "ANSWER TO THIRD AMENDED CROSS COMPLAINT" (Rec. 40-42) filed May 2nd, 1950; "ANSWER TO CROSS COMPLAINT OF DEFENDANT CULBERT L. OLSON AMENDING AND REPLACING HIS THIRD AMENDED CROSS COMPLAINT" (Rec. 51-55), filed May 27th, 1950; and "ANSWER TO CROSS-CLAIM, IN AMENDED ANSWER" (Rec. 15-16), filed September 21st, 1950; the plaintiffs and cross defendants alleged the necessary facts constituting adverse possession for seven years and the payment of all taxes levied or assessed during said period, as well as limitations and laches.

The cause was tried before the court without a jury from December 9th to December 12, 1952 (Rec. 97).

The trial court filed his Memorandum Decision (Rec.

63-86) on January 27th, 1953, in which he reviewed the evidence, and which decision contained, among other things the matters shown in the abstract of title (Plaintiffs' Exhibit J) as follows:

1. Defendant and cross-complainant, Culbert L. Olson, obtained title to the subject lands by Sheriff's Deed dated February 25th, 1916, recorded March 3rd, 1916, in Book "20" of Deeds, pages 35-36 (pages 26-27.)

2. Defendant and cross-complainant, Culbert L. Olson, failed to pay the taxes for the year 1933, and subsequent taxes for the years 1934, 1935, 1936 and 1937, and a tax sale was made of the property dated December 21st, 1933, as shown in Tax Sale Record for the year 1933, page 32, line 9, Tax Sale No. 413 (page 32).

3. Auditor's Tax Deed was issued by the Auditor of Uintah County, Utah, to Uintah County, covering the lands in question, dated April 15th, 1938, recorded May 9th, 1938, in Book 31 of Deeds, pages 426-427 of the records of Uintah County, Utah (page 33).

4. Uintah County sold the subject lands to Burns Hallet on September 30th, 1940, as shown by commissioners minutes and an "Agreement for Salt of Real Property" shown at pages 34-36.

5. Uintah County conveyed its interest in the property to Burns Hallet on September 22nd, 1943, by Tax Deed recorded September 28th, 1943, in Book "34" of Deeds, page 54, of the records of Uintah County, Utah (page 37).

6. Burns Hallet and wife conveyed this property to J. Parry Bowen by Quit Claim Deed dated December 20th, 1945, recorded January 15th, 1946, in Book "35" of Deeds, page 263 of the records of Uintah County, Utah (page 38).

7. J. Parry Bowen, also known as J. Perry Bowen, also known as J. P. Bowen, and his wife, conveyed to J. A. Cheney an undivided one half interest in and to all of the oil, gas and other minerals in and under and that may be produced from the lands involved in this action and other lands, by Mineral Deed acknowledged August 19th, 1946, recorded August 21, 1946, in Book "10" of Miscellaneous, pages 332-333, of the records of Uintah County, Utah (pages 41-42).

8. J. A. Cheney and wife conveyed one-eighth interest in and to all oil, gas and other minerals, in and under, and that may be produced from the subject lands, to J. R. Robertson, by Mineral Deed dated June 14th, 1948, recorded July 14th, 1948, in Book "13" of Miscellaneous, page 122 of the records of Uintah County, Utah (page 43).

9. A Royalty Contract was made by J. A. Cheney and Jennie L. Cheney, his wife to Guy T. Woodworth, conveying an undivided one-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from the subject lands, and dated July 26th, 1947, recorded July 28th, 1947, in Book "12" of Miscellaneous, pages 210-211 (pages 46-47).

10. A Quit Claim Deed was given by J. Parry Bowen

and wife to Keith J. Bowen, dated April 26th, 1947, recorded May 15th, 1947, in Book "36" of Deeds, page 338, as Entry No. 30095, covering the lands involved in this action (page 55).

11. A WarrantyDeed was executed by Keith J. Bowen and wife, to Morley Dean and Irene M. Dean as joint tenants and not as tenants in common with full right of survivorship, dated May 8th, 1947, recorded May 15th, 1947, in Book "36" of Deeds, page 338, Entry No. 30096, in which the grantor reserves all of the minerals, oils and gases upon, in or under the said lands (page 56).

12. Assessment and payment of taxes for the period from 1940 to 1946 inclusive, and for the year 1949 are shown at page 59.

13. A preliminary tax sale was made for taxes delinquent for the year 1947, and subsequent delinquent taxes for the year 1948, which is undated. There is no record of the filing of this tax sale record in the abstract (page 60).

14. Redemption Certificate dated December 30th, 1949, showing redemption of the tax sale shown at item 13 (page 61,) by "J. Perry Bowen by Morley Dean."

15. Oil and Gas Lease from Keith J. Bowen and Norma H. Bowen, his wife, to Phillips Petroleum Company, dated December 8th, 1945, recorded May 13th, 1946, in Book "9" of Miscellaneous, pages 573-78, Entry No. 26474 (pages 39-40).

16. Oil and Gas Lease from J. Parry Bowen, et al., to Phillips Petroleum Company, dated November 20th, 1946, recorded December 9th, 1946, in Book "11" of Miscellaneous pages 495-9, Entry No. 28639 (pages 53-54).

There are other conveyances in the abstract which occurred subsequent to the filing of the action which do not affect this proceeding.

In his Memorandum Decision, the trial judge gives his opinion and decision as to the facts of adverse possession and the payment of taxes (Rec. 63-86). The facts on adverse possession and the payment of taxes are accepted by the plaintiffs and cross-defendants except in minor details, but object to the legal effect of such facts.

At page 76 of the record, said Memorandum Decision reads:

> "It is therefore held that the possession of Hallet, Bowen and Dean, in succession for the full seven years was open and notorious within the requirements of the law. Thus, unless the plaintiffs have failed to pay all taxes levied and assessed during the adverse period, **and unless such failure if any, results in an interruption of the adverse possession, the Court will have to hold plaintiffs' possession adequate to entitle plaintiffs to judgment."** (Emphasis appellants)
> "The latter question with respect to plaintiffs' payment of the taxes assessed against the subject land for the full required seven years of adversity, is raised by the defendant and reserved in the Pre-Trial Order."

* * * * *

"The record shows that no taxes were assessed against the subject lands in 1940 or 1941. It shows that each year thereafter to and including the year 1946, all taxes were promptly paid. In 1947, however, **assessment was properly made** in the name of J. Parry Bowen, as owner, the apparent title following the Burns Hallet purchase being in him. Those taxes were not paid in 1947 and the property was sold to Uintah County. The 1948 taxes assessed against the property were not paid **at due date** and the amount of **the taxes,** interest, penalties and costs were added to the 1947 certification. On December 30, 1949, **all** delinquent **taxes,** interest, penalties and costs **were paid by 'J. Parry Bowen by Morley Dean,'** (the latter having succeeded to the County's rights on May 8, 1947,) and a Redemption Certificate was issued. Payment of such taxes is mandatory if an adverse claimant is to obtain title." (Emphasis ours.)

* * * * *

"Thus it is clear that unless this Redemption is a payment of 'taxes which have been levied and assessed upon such land according to law,' the adverse claimants, plaintiffs, have failed to establish their title by adverse possession." (Rec. 77)

Continuing on page 81 the Memorandum Decision states:

"1947 and 1948 taxes were not paid. This action began by the filing of the Complaint on September 22, 1948, and the redemption of the two delinquent years' taxes did not occur until December 30, 1949, a year, three months and eight days after the action began. Thus, on the date the action began the plaintiff's predecessor in interest had paid taxes for only **six,** and not **seven** consecutive, 'continuous,' years as required by the statute."

On page 84 of the record, in his Memorandum Decision, the Lower Court after having discussed the status of the defendant, Olson, as being barred by the provisions of Section 104-2-7, U. C. A. 1943 (now 78-12-7 U. C. A. 1953) makes the following comment:

> "But because he **is** the title holder, and because his possession is **presumed** in the law, whenever the adverser either fails to maintain his possession in **all** of its elements, or whenever he fails to **pay any** taxes lawfully levied and assessed against the land, by such failure he changes his status from an adverser to that of a mere trespasser, the constructive possession of the legal title holder attaches, and the adverser, if he is to acquire title, must build from that point forward his **seven years** of adversity and payment of taxes."

At pages 84 and 85 of the record, the Memorandum Decision states:

> "The situation of the facts and law of the instant case might well induce the same expression as the court uses on page 545 of the Utah Report (Keller vs. Chournos, 102 Utah 535, 133 P.2d 318): 'There are no equities on appellants' (defendant's) side of this case. It tends to offend one's sense of justice. x x we are x x forced to adhere to the cases so far decided on the strict rule.' "

In concluding his Memorandum Decision, the Lower Court states on page 85 of the record:

> "It is thus ordered that judgment enter in favor of the defendant Culbert L. Olson upon plaintiffs' Complaint, No Cause of Action, and that the defendant Culbert L. Olson have judgment in his

favor and against the plaintiffs and each and all thereof upon his counterclaim and cross complaint."

After the filing of the Memorandum Decision above quoted, the plaintiffs made their "Motion to Reopen" found on pages 91 to 94 of the record. This motion was based upon Rule 61, Utah Rules of Civil Procedure. It went to the effect that there was no evidence before the court and no presumption could be raised that the taxes for the year 1947 were assessed upon said land according to law as required by Section 104-2-12 U. C. A. 1943 (now 78-12-12 U. C. A. 1953) to support the finding of the Lower Court that the plaintiff failed to pay all of the taxes which had been legally assessed upon the said land described in the plaintiffs' Complaint on file in the action. The affidavit suporting said motion was made for the purpose of showing "That the taxes for the year 1947, in Uintah County, State of Utah, were not assessed according to law." (Rec. 91-94.)

The motion was denied (Rec. 95-96) as follows:

> "The Court thus holds plaintiff to be in error in his contention that the title holder has the burden of proving that any tax assessed but unpaid during the adverse period was assessed 'according to law,' but to the contrary, holds that the adverser has the burden of proving that **he paid** all seven years taxes, or that there were **no taxes assessed in any year in which he failed to pay taxes,** or that any years taxes assessed **which he did not pay** were not 'lawfully assessed.' " (Emphasis ours.)

It is to be noted here that the Lower Court had already

found in his Memorandum Decision at page 15 (Rec. 77) that the plaintiffs **had paid** the taxes.

The Lower Court wrote and filed his own findings, conclusions and decree (Rec. 97-107). Conclusion of Law No. 4 (Rec. 103) reads:

> "That defendant Culbert L. Olson is entitled to have the decree of this Court made and entered herein awarding him judgment against the plaintiffs' Complaint, and in his favor upon his **Counterclaim,** quieting title in him, in and to the real property described in paragraph 1 of the Findings of Fact above." (Emphasis ours.)

Plaintiffs and cross-defendants then made a "MOTION TO REOPEN" supported by affidavit (Rec. 108-112), and a "MOTION FOR NEW TRIAL" supported by affidavit (Rec. 113-117) which were filed April 10th, 1953. The first motiion was based upon rule 60 (b) (1) and (7) that through mistake, inadvertance, surprise and excusable neglect, the plaintiffs should be allowed to present evidence on the assessment for 1947 which was not made according to law in order that substantial justice might be done according to the Lower Court's statement at the bottom of page 84 and the top of page 85 of the record. The second motion was based upon Rule 52 (b) and Rule 59 (a) (4), (6) and (7), of the Utah Rules of Civil Procedure, for substantially the same reasons.

The Lower Court entered his "ORDER OVERRULING MOTIONS" on May 26th, 1953, as shown at page 120 of the record.

The following facts are stated for the purpose of showing the inception of adverse possession:

Burns Hallett bought the property from Uintah County on September 30th, 1940 (Plaintiffs' Exhibit J, pages 34-36). He immediately went upon it and ascertained the boundaries (Tr. 26). He made an arrangement with the Indian Department for exchange use of grazing on March 20th, 1941, or thereabouts (Tr. 36, Tr. 188). Prior to that date, Hallett had been using Indian lands and the Indians had been using his lands (Tr. 37, Tr. 195). The arrangement for grazing was made as the result of the respective use by the other of the lands involved (Tr. 37, Tr. 197). John K. Arnold knew of Burns Hallett's claim of ownership in 1940 (Tr. 124). William H. Arnold knew of his ownership in 1940 or 1941 (Tr. 161).

As to the facts barring defendant and cross-complainant by limitations and laches on the part of the said defendant, the following are stated:

Culbert L. Olson went to California in 1921 (Tr. 4). In his testimony from pages 3 to 22 of the transcript, he is very vague on his recollection of the events from the time he quit paying taxes in 1933 up to the present time. In his letters (Plaintiffs' Exhibits F, H and I) he first says "I do not know at this time what interest I have in the land in Uintah County" and then tries to show that he had leases on the property under which the present adversers agreed to pay the taxes and then didn't. He repudiates the facts stated

in the letters in his testimony (Tr. 16 et. seq.). He did not, during that time, personally supervise the property and left it up entirely to Clarence I. Johnson (Tr. 11, 12) who was supposedly his agent but whom he did not mention in his said letters. His only knowledge of Ercel Johnson was told to him by Clarence I. Johnson in 1946 (Tr. 12). He couldn't find any files or records to ascertain what lands he owned in Uintah County and any leases which he could have made on them (Tr. 16, 17, 240). He had no record of any correspondence concerning this land (Tr. 12). His only contact with this land between 1933 and March, 1950, was a conversation had with Clarence I. Johnson in Los Angeles in 1946 (Tr. 11-12, Tr. 241-242, Tr. 251). He testified "that from 1934 on, * * * until 1943, and past, I was so occupied in public life that these matters were neglected by me to make injuiry into" (Tr. 10). The abstract of title (Plaintiffs' Exhibit J, page 39-40, 43-54) shows two oil and gas leases were executed on this land in 1945 and 1946. This abstract was forwarded to the defendant and received by him on December 19th, 1949 (Tr. 241). He was told by Mr. Stanley in a telephone conversation on December 7th, 1949, that there was an oil well drilling in the vicinity "about nine miles away." (Tr. 260).

Boyd Winn, defendant's witness, never heard of Culbert L. Olson until a few days before the first trial in 1950 (Tr. 207). He never heard of any claim of Culbert L. Olson being the owner of said land (Tr. 211) although he had resided right next to it since 1943.

POINTS

I.

APPELLANTS CONTEND THAT ADVERSE POSSESSION COMMENCED ON SEPTEMBER 30th, 1940, AND WAS ESTABLISHED SEPTEMBER 30th, 1947.

II.

REDEMPTION OF THE 1947 AND 1948 TAXES ON DECEMBER 30th, 1949 HAD THE SAME EFFECT AS IF THE TAXES WERE PAID BEFORE DLINQUENCY.

III.

THE LOWER COURT SHOULD HAVE GRANTED THE MOTIONS TO REOPEN AND THE MOTION FOR A NEW TRIAL.

IV.

APPELLANTS SHOULD HAVE BEEN GRANTED A DECREE QUIETING THEIR TITLE AS CROSS-DEFENDANTS ON THEIR ANSWER TO THE CROSS-COMPLAINT OF RESPONDENT, AND AS PLAINTIFFS ON THEIR ANSWER TO THE COUNTER-CLAIM IN THE AMENDED ANSWER OF TTHE DEFENDANT.

A. APPELLANTS PAID ALL TAXES ASSESSED PRIOR TO THE FILING OF THE CROSS-COMPLAINT AND PRIOR TO THE FILING OF THE COUNTER-CLAIM IN THE AMENDED ANSWER.

B. THE REDEMPTION OF THE 1947 AND 1948

TAXES ON DECEMBER 30, 1949, WAS THE PAYMENT OF TTAXES UNDER SECTION 78-12-12 U.C.A. 1953.

C. AGAINST THE COUNTERCLAIM AND CROSS-COMPLAINT OF DEFENDANT AND CROSS-COMPLAINANT, PLAINTIFFS AND CROSS-DEFENDANTS CAN RELY UPON THE REDEMPTION AND PAYMENT OF TAXES ON DECEMBER 30th, 1949.

V.

DEFENDANT AND CROSS-COMPLAINANT OLSON IS BARRED BY LACHES FROM ASSERTING HIS ANSWER, CROSS-COMPLAINTS AND COUNTER-CLAIM.

VI.

THE LOWER COURT MADE SOME MINOR ERRORS IN HIS FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

ARGUMENT

I.

APPELLANTS CONTEND THAT ADVERSE POSSESSION COMEENCED ON SEPTEMBER 20th, 1940, AND WAS ESTABLISHED SEPTEMBER 30th, 1947.

The appellants took the position in the court below, that their adverse possession commenced on September 30th, 1940. Uintah County had received title by Auditor's Tax Deed on April 15th, 1938 (Plaintiffs' Exhibit J, page 39). On September 30th, 1940, the County Commissioners sold

the property to Burns Hollett (the court finding in Finding 5, Rec. 98-99 that this is the same person as Burns Hallett) as shown by Plaintiffs' Exhibit J, pages 34, 35 and 36. The Indian Department had been grazing these lands for many years before this time (Tr. 194-198), and continued so to graze the lands involved in this action (Tr. 195) in the period commencing November 15th, 1950, and ending May 1st, 1941. About March 20th or 21st, 1941, the Indian Department came up to "see about trespassing my cattle" as testified by Burns Hallett (Tr. 37). Prior to that date, Hallett had been using the Indian "School lands" near his other lands in Section 13, Township 2 South, Range 1 East, Uintah Special Meridian (Tr. 34, 35,) for the grazing of about 30 head of cattle (Tr. 46). An arrangement was made that the Indian Department would use the lands in controversy here during their grazing period from November 15th, each year to the following May 1st, and that Burns Hallett would use the Indian "School lands" in the spring, summer and fall (Tr. 41). The Memorandum Decision (Rec. 68-70) held:

> "Burns Hallett, however, did not graze any cattle upon the grounds in question, nor did he ever go back to ascertain the success or failure of his ditch construction. Rather, **in the winter of 1940 and the spring of 1941,** he turned his stock upon the range at his lower place, and allowed them to run upon Indian lands. The Indians habitually grazed their lands in the fall, through the winter and into late spring, and the ground in question was suitable for grazing at that season. About March 20th or 21st of 1941, Burns Hallett met with Joe A.

Wagner and Ralph J. Richards, agents for the Indian Service and the agents made some complaint to Hallett about the latter's cattle being allowed to range upon Indian lands. Burns Hallett told the agents of his claimed ownership of the lands in question and suggested that the Indian Department and he exchange grazing, he to be allowed to turn his stock loose upon Indian lands in the late spring and summer and early fall months and the Department to graze the lands belonging to Hallett, including the questioned lands, during the late fall, winter and early spring." (Emphasis ours.)

* * * * *

"During all this period, Indian cattle ranged on the lands in question 'every fall, winter, and early spring,' and this grazing exhausted the utility of the land."

Appellants agree with the trial court on the facts set forth above, but object to the carrying forward of these facts into finding 9 of the Findings of Fact (Rec. 4) in the following quoted particulars:

"during the summer of 1951" (line2 of finding 9).
"And that thereafter" (lines 9 and 10, finding 9).

Examining the Lower Court's Memorandum Decision as above quoted, the excerpts from the Findings of Fact above noted should read:

"On March 20th or 21st, 1951."
"and that beginning with the winter of 1940."

As to that part of finding 6 (Rec. 99) which read as follows:

"That aside from locating the boundary lines on

> the said real estate, the said Burns Hallett did no act whatsoever to take possession under his contract of purchase or to indicate to any person who may have been interested in such land that he was by such act taking or asserting actual possession thereof under or by virtue of his contract above referred to in paragraph 5."

Such finding is entirely in error, is contrary to the evidence as set forth in the Memorandum Decision above quoted, and also at variance with findings 7 and 9.

As to all other findings of the court from 1 to 9, the appellants are in harmony.

What appellants do contend under this heading aside from the few errors made by the lower court in his findings 6 and 9, is that the trial court failed to include in his findings the possession of Morley Dean set forth at page 71 of the record, and to carry into such findings his finding in his Memorandum Decision as shown at page 76 of the record:

> "It is therefore held that the possession of Hallett, Bowen and Dean, in succession for the full seven years was open and notorious within the requirements of the law. Thus, unless the plaintiffs have failed to pay all taxes levied and assessed during the adverse period, * * * the Court will have to hold plaintiffs' possession adequate to entitle plaintiffs to judgment."

In the case of Bozievich v. Slechta, 109 Utah 373, 166 P.2d 239, the facts show that the county first leased the property in question to a tenant, then sold under a contract as in the present case, and then later conveyed by deed.

This Supreme Court ruled that the defendant, Slechta, could tack on the possession of the tenant and the contract holder. The position of Burns Hallett under his contract of sale would be the same as that of a tenant, and the giving of that contract would be an act of the county in asserting possession in itself.

> "The fact that there were defects in the proceedings did not change the nature of the county's claim. It was open, hostile and adverse to the record owner's right."

At pages 66 and 67 of the record, the Lower Court in his Memorandum Decision, reasons on pages 4 and 5 of such decision that the adverse possession of the plaintiffs and their predecessors in interest did not begin until June 30th, 1941, when Burns Hallett cleaned out a ditch and brought irrigation water onto the subject lands. The said decision went to the effect that the prior grazing agreement between Hallett and the Indian Agency and their respective uses during the winter of 1940 and the spring of 1941, were not adverse acts. These findings were carried forward into findings 7 and 9 of the findings of fact (Rec. 98-99) and into conclusion 3 of the Conclusions of Law (Rec. 102). This is on the basis that the adverser must **himself** do some adverse act in order to start adverse possession by using the property **personally.**

In the case of Kellogg v. Huffman, 30 P.2d 593, the adverser did not go upon the ground except to make a lease. In that case, the lessees had been in actual possession and

had used the property for many years prior to the purchase by the adverser, just as the Indian Department had been using the lands in the present case for many years prior to the purchase by Burns Hallett. In that case, there was no change in the use of the land thereafter and no notification given to anyone except the lessees that the adverser was taking posession and leasing the property to the tenants, and the opinion reads:

> "The appellants virtually concede that the use thus made of this land during these years would have been sufficient to establish a title by adverse possession had this use been by the respondents personally or by any tenant other than the Bourdieu brothers. But they argue that the Bourdieu brothers, prior to their recognizing and renting from the respondents, had for some years pastured this land in connection with other lands used by them without the permission of any one and under no claim of right; that after the issuance of the tax deed they continued to use the land in the same manner as before; and that their use of the land as tenants of the respondents could not inure to the benefit of the respondents until notice of a change in the manner of occupation and use was brought home to the appellants. They rely on a line of cases in which it has been held that a possession and use which has been entered into with the consent of the owner cannot become adverse to such owner without some notice of a canged intention. While the rule just referred to has its proper application in some cases, it neither applies nor controls under the circumstances here appearing. It may first be observed that such use of this land as was made by these tenants prior to the time they leased the same from the respond-

ents, was neither with the knowledge or consent of the appellants. During those years they simply allowed their sheep to roam over the land without claim of right. A somewhat similar contention was considered in the case of Holtzman v. Douglas, 168 U. S. 278, 18 S. Ct. 65, 66, 42 L. Ed. 466. In that case the court said: 'The doctrine which the plaintiff seeks to set up, we think is not applicable to the facts of this case. After the puchase at the tax sale, the delivery of the deed, and the recording thereof, Mrs. Douglas, in 1867, claimed title to the land, and demanded possession thereof from Rothwell, and by reason of the understanding then arrived at between herself and Rothwell he became the tenant of Mrs. Douglas as the representative of the heirs at law of William Douglas, and such tenancy continued up to the commencement of this action. She went to him under a claim of ownership and of the right to immediate possession of the lot as owner. He then acknowledged her right, became her tenant, and paid rent to her. That certainly placed Mrs. Douglas, as the representative of the heirs, in possession of the lot. From that time the facts are sufficient upon which to base a claim of adverse possession. We think it was inaugurated when Rothwell, under his agreement with Mrs. Douglas, acknowledged her right, and paid her rent; and it was immaterial so far as the heirs are concerned, that Rothwell had before that time entered upon the lot, although under no claim of title, and presumably in subordination of the title of plaintiff's predecessors. Harvey v. Tyler, 2 Wall. (69 U. S.) 328 (17 L. Ed. 871). If Rothwell were himself asserting a title by adverse possession, while coming into possession by acknowledgement of and under the title of the owners, there might be an opportunity for the application of the doctrine contended for by

plaintiff, and in such case Rothwell could not set up title by adverse possession while entering in subordination to the title of the owner, unless he first vacated, and then retook possession as a hostile entry, or did some act necessarily evincing an intention to put an end to his tenancy. We are not dealing with Rothwell's rights or title. The defendants did all they were called upon to do in order to take possession and inaugurate an adverse holding, when they came with their tax deed, claimed to own the property described in it, and exercised an act of ownership by letting the lot to Rothwell as a tenant at a certain rent. When Rothwell recognized the claim of ownership, and remained in possession from that time in subordination to the rights of Mrs. Douglas and the heirs at law, their adverse possession, so far as this point is concerned, was sufficiently inaugurated. Mrs. Douglas was no party or privy to the prior entry of Rothwell, and therefore, whatever the circumstances as proven in this case regarding such prior entry, her rights and those of the heirs cannot be in any way affected thereby. There is no pretense of any fraud or concealment in the case by any one; certainly not by Mrs. Douglas. Neither she nor the heirs were bound, in order to maintain their rights, to give any written or verbal notice to the former owners that they were in possession through Rothwell; nor did the possession of Rothwell, as tenant of the Douglas heirs, fail to commence at the time of this agreement because he did not give notice to the former owners of his recognition of the title and right to the possession as claimed by Mrs. Douglass.' "

Appellants contend that under the rulings of the Bozievich v. Slecta case, supra, and the case of Kellogg v. Huff-

man, supra, that the adverse possession actually commenced on September 30th, 1940, and under the facts found on page 76 of the Memorandum Decision, continued until the trial. Burns Hallett received full rental for the use by the Indians of his lands during the fall, winter and spring of 1940 and 1941, by being allowed to graze the Indian lands during the spring, summer and fall of 1941, and the understanding of March 20th, 1941, was a confirmation of the use that each had of the other's property prior to that date.

As to the payment of taxes during such period or the non-assessment of such taxes, the Lower Court found in finding 11 (Rec. 101) that no taxes were assessed in 1941, and that in 1942, 1943, 1944, 1945 and 1946, the taxes were promptly paid by the plaintiffs and their predecessors in interest. On page 14 of his Memorandum Decision (Rec. 76), the Lower Court found that no taxes were assessed for the year 1940. The record shows that no taxes were assessed for the years 1940 and 1941, and that they were promptly paid by the plaintiffs and their predecessors in title for the years 1942, 1943, 1944, 1945 and 1946, or a total of seven years successively.

Plaintiffs and appellants therefore take the stand that adverse possession began on September 30th, 1940, that it had ripened before the 1947 taxes became delinquent on November 30th, 1947, and that the payment of said taxes were not necessary to obtain the decree quieting their title.

II.

REDEMPTION OF THE 1947 AND 1948 TAXES ON DECEMBER 30th, 1949 HAD THE SAME EFFECT AS IF THE TAXES WERE PAID BEFORE DELINQUENCY.

The appellants were not deprived of their title by any tax sale prior to the filing of their complaint. The "PRELIMINARY TAX SALE" which is used as a basis for defeating plaintiffs' adverse title is shown at page 60 of Plaintiffs' Exhibit J. There is no date shown on the sale. There is no proof in the record as to when it was made. It could in all probability have been made after the filing of the complaint on September 22, 1948. If the respondent is going to contend that redemption of taxes after the filing of the plaintiffs' complaint is not a payment of taxes because plaintiffs were divested by a tax sale, he must prove that there was a tax sale **before** the filing of such complaint. This he has not done. The respondent is under as much obligation in maintaining his title to pay taxes as the appellants are in maintaining their title, and the county is the one who is protected by the statute requiring the payment of taxes as a condition precedent to the granting of a decree quieting title under adverse possession.

In the case of Sorensen v. Bills, 70 Utah 509, 261 Pac. 450, at the bottom of page 451 of the Pacific Reporter, it is said:

> "The owner of the property, within the period allowed for redemption, had redeemed the property from that tax sale, and thereafter any right that the county had by reason of the levy and

> the tax in the year 1917 was extinguished to the same extent that its claim would have been had the taxes been paid prior to the delinquent tax sale of December 17, 1917. Such is the plain intent of the statute." Comp. Laws Utah, 1917, No. 6024."

Said Section 6024 became Section 80-10-59, R. S. U. 1933, Section 80-10-59, U. C. A. 1943, and is now Section 59-10-56, U. C. A. 1953. The statute has been slightly amended to fit the new amendments to the tax laws but is substantially the same as the 1917 statute.

Appellants paid the county and absolved the property from the tax lien. Respondent did not pay these taxes. Each having had an equal opportunity to pay the taxes, the respondent cannot now complain about the rulings above quoted, that the payment relates back and has the same effect as if the taxes were paid before delinquency.

We think that this is further sanctioned by the rule laid down in Meagher v. Uintah Gas Co., 255 P.2d 989, and goes further, as follows:

> "Such title acquired after action begun, but before defendant pleads adversely, may be pleaded and proved in derogation of the defendant's adverse claim." (Citing Welner v. Stearns, 1911, 40 Utah 185, 120 P. 490, Ann. Cas. 1914C, 1175.)

The Answer of Culbert L. Olson (Rec. 7) is in no wise an adverse claim to the property involved in this action. His prayer that "his right, title and interest in any of the real property described in plaintiff's complaint be ascertained and determined" is an admission that he himself has not ascertained that he has any rights in the property and

certainly where several tracts are involved, his claim to be adverse to any one of them must at least be sufficient to show in particularity which piece of property he claims an interest in. It it can be conceded, which appellants do not admit, that the redemption of the 1947 taxes is "acquiring title", under the present facts and circumstances and under the above decision, the appellants have perfected that title by paying the taxes on December 30th, 1949. The said "Answer" does not state any facts which could constitute an adverse claim against the property involved in this appeal.

III.

THE LOWER COURT SHOULD HAVE GRANTED THE MOTIONS TO REOPEN AND THE MOTION FOR A NEW TRIAL.

After the entry of the Memorandum Decision (Rec. 63-86) showing that the plaintiffs' possession did not commence to run until June 30th, 1941 (Rec. 67) and that it was necessary to pay the 1947 taxes before the commencement of the action to establish adverse possession under Section 78-12-12, U. C. A. 1953, the appellants filed their "MOTION TO REOPEN" shown at pages 91 to 94 of the record. This motion was made under Rule 61 of Utah Rules of Civil Procedure, on the ground that it was necessary to reopen in order that substantial justice to the parties might be done.

At pages 84 and 85 of the record, the Lower Court in his Memorandum Decision states:

"Thus it must be held that when plaintiffs failed

> to pay the seventh year's taxes, **they being lawfully assessed,** their right of possession as adversers of the title terminated, and the constructive possession of the owner attached, making plaintiffs mere trespassers. Keller vs. Chournos, supra." (102 Utah 535, 133 P.2d 318).
>
> * * * * *
>
> "The situation of the facts and law of the instant case might well induce the same expression as the court uses on page 545 of the Utah Report: 'There are no equities on appellants' (defendant's) side of this case. It tends to offend one's sense of justice, x x we are x x forced to adhere to the cases so far decided on the strict rule.' "

If the Lower Court is relying on the cited case for authority to terminate the adverse possession by failure to pay taxes, when did defendant Olson pay any taxes? When did he start suit to quiet his title?.

In reading the Keller vs. Chournos case, supra, we find at page 323 of the Pacific Reporter, the following:

> "The most that defendants Chournos could claim, under the record in this case, would be possession of the land adverse to the legal owner and payment of the taxes thereon for a period of about four years, from November 3, 1936, when they took possession under the County's deed, until plaintiff paid the general taxes for 1940 and instituted this action October 25, 1940."

The Trial Court held that Morley Dean paid the taxes by redeeming them on December 30, 1949, but that such a payment was not made before the commencement of the action, and that redemption was not a payment of taxes

under Section 78-12-12, U. C. A. 1953.

From the Motion and Affidavit supporting it (Rec. 91 to 94) it is stated that there was no evidence or presumption that the taxes for the year 1947 were "assessed according to law" as required by Section 78-12-12 supra. The supporting affidavit showed that the auditor's affidavits as required by Sections 80-7-9 and 80-8-7 U. C. A. 1943, were premature, and were dated May 5th, 1947 before the equilization meetings or extension of taxes.

To this Motion the court entered his "ORDER UPON MOTION TO RE-OPEN" shown at pages 95 and 96 of the record. He made his denial to re-open upon the fact that the appellants had not made the motion under Rule 60 (b) R. C. P. 10 U. C. A. 662. This rule is for relief from a judgment and no judgment having been entered, such supposition was premature and not applicable. The Order further states:

> "The Court * * * * * holds that the adverser has the burden of proving that he paid all seven years taxes, or that there were no taxes assessed in any year in which he failed to pay taxes, **or that any years taxes assessed which he did not pay were not 'lawfully assessed.'** " (Emphasis ours.)

THE PLAINTIFFS AND CROSS-DEFENDANTS HAD PAID THE TAXES BY THEIR REDEMPTION OF DECEMBER 30th, 1949 BEFORE THE FILING OF THE CROSS-COMPLAINT ON JANUARY 9th, 1950. As heretofore shown in Sorensen v. Bills, supra, this had the same

effect as if the taxes were paid before delinquent. The plaintiffs and cross-defendants were not trying to find an excuse for not paying taxes in making this motion insofar as it pertained to this cross-complaint and counter-claim of defendant and cross-complainant. The argument was that inasmuch as the defendant and cross-complainant Olson had made the claim that the redemption on December 30th, 1949 was not the payment of taxes for 1947 because there was a valid tax sale, then it was the burden of the party claiming that the sale was a valid sale to allege and prove the validity of the 1947 sale. In other words, according to the argument of defendant and cross-complainant, there was a valid tax sale which divested plaintiffs and cross-defendants of their adverse title, and that the redemption of the taxes on December 30th, 1949, was not the payment of taxes but a redemption from the sale.

It is elementary in this state that one who relies upon the validity of a tax sale proceeding must allege and prove that "every essential step in the tax proceedings to divest the owner of title has been conducted according to law." Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401. While the question has never been raised in this state as far as appellants can find, it should be just as elementary that one who relies upon the validity of a tax sale to divest adverser of his adverse title and so to claim that a redemption of the tax sale is not the payment of taxes, the burden of proving the validity of the tax sale upon which he relies should fall squarely on the shoulders of the party asserting

the validity of the tax sale. We again emphasize that had appellants failed to pay the taxes at all, and were trying to find an excuse for the non-payment, then the rule would have been as outlined in the "ORDER UPON MOTION TO RE-OPEN" (Rec. 91-94), and the burden of so proving would have been upon appellants. But this is not the case.

After the entry of the Findings of Fact, Conclusions of Law and Decree (Rec. 97-107), the plaintiffs filed a "Motion to Reopen" under Rule 60 (b) (1) and (7), and a "Motion for New Trial" under Rule 52 (b) and Rule 59 (a) (4), (6) and (7), (Rec. 108-117.) These motions went to the effect that the plaintiffs considered that their adverse possession had matured before the 1947 taxes were delinquent, and even though it was established after the 1947 taxes were delinquent, that it had matured before the commencement of the action, and that the redemption on December 29th, 1949, was a payment of the taxes for that year. Further that the court found in his findings, conclusions and decree that the 1947 taxes were "assessed according to law" when there was no evidence before the court to substantiate such a finding. Plaintiffs offered to present proof, if the case were re-opened or a new trial granted, that the taxes for 1947 were not "assessed according to law" as provided by Section 78-12-12 U. C. A. 1953. Affidavits showing that the Auditor's Affidavits required by law as above set forth were dated May 5th, 1947, and were premature, and therefore the taxes were not assessed according to law, were affixed to each of the Motions.

The Trial Court overruled the motions (Rec. 120).

Appellants quote from the case of Telonis v. Staley, 104 U. 537, 144 P.2d 513, at page 517:

> "When the auditor finally delivers the assessment roll to the treasurer, it is required to be correct and complete, and Sec. 80-8-7, R. S. U. 1933 (Sec. 6006, C. L. U. 1917), requires the assessment roll as corrected to be verified by the auditor. The auditor must declare under oath that he has corrected it and has made it conform to the requirements of the county board of equalization and the State Tax Commission, and that the respective sums due as taxes have been computed and that he has added up the column of valuations, taxes, and acreage as required by law. See Sec. 2606, R. S. U. 1898, and C. L. U. 1907. When the assessment roll is thus delivered to the treasurer with the final auditor's affidavit of authentication, the auditor certifies the same as the tax roll to the treasurer and to the public that the assessment roll as the official tax roll is complete and correct. The aforesaid affidavit is one of the statutory functions of the county auditor, and such affidavit must be executed and properly attached. The property owner is entitled to rely on such verification and the treasurer is bound thereby and he is required to proceed to issue the tax notices in accordance therewith, and to collect the taxes based on the computations of the auditor. The final affidavit of the auditor thus becomes highly important, and in the absence of any curative provision in the statutes for failure of the auditor to subscribe to and attach such certificate of authentication in affidavit form, the requirement of the statute must be observed."

The above quoted case is upheld in Equitable Life & Casualty Ins. Co., v. Schoewe, 105 Utah 569, 144 P.2d 526; Tree v. White, 110 Utah 1033, 171 P.2d 398; Petterson v. Ogden City, Utah, 111 Utah 125, 176 P.2d 599; Jenkins v. Moran, 113 Utah 534, 196 P.2d 871, and Pender v. Jackson, et al., 260 P.2d 542. In the last case, this Supreme Court held:

> "Telonis v. Staley, 104 Utah 537, 144 P.2d 513, 517, held that the statutes requiring attachment of the auditor's affidavits to the assessment rolls, Utah Code Ann. 1953, 59-7-9 and 59-8-7, **established a substantive rule, designed for the protection of the taxpayer,** and 'in the absence of any curative provision in the statutes for failure of the auditor to subscribe to and attach such certificate of authentication in affidavit form, the requirement of the statute must be observed.' " (Emphasis ours.)

Morley Dean and Irene Dean, plaintiffs and cross-defendants, are just as much taxpayers as is Culbert L. Olson, defendant and cross-complainant, when taxes are assessed to them or their predecessors, and the rule in the last quoted case should apply just as much to the adverser as to the original owner. What is sauce for the goose should be sauce for the gander.

In the said Telonis case, supra, this Supreme Court granted a new trial although there is nothing in the decisions in either Telonis case to show that a new trial was asked for.

In view of the fact that the court made the statement

in his Memorandum Decision (Rec. 84-85) that his decision "tends to offend one's sense of justice," his rulings denying the motions to reopen and for a new trial appear to the appellants to be arbitrary and an abuse of discretion. Appellants should have been allowed to present proof that the 1947 taxes were not "levied and assessed upon such land according to law" as required by Section 104-2-12, U. C. A. 1943, as carried forward into Section 78-12-12, U. C. A. 1953. In such event, the plaintiffs would have shown the invalidity of the 1947 sale, and should have recovered on their complaint under the lower court's ruling that they had more than seven years adverse possession (Rec. 76).

IV.

APPELLANTS SHOULD HAVE BEEN GRANTED A DECREE QUIETING THEIR TITLE AS CROSS-DEFENDANTS ON THEIR ANSWER TO THE CROSS-COMPLAINT OF RESPONDENT, AND AS PLAINTIFFS ON THEIR ANSWER TO THE COUNTER-CLAIM IN THE AMENDED ANSWER OF THE DEFENDANT.

Granting for argument, but not conceding, that the lower court was right in holding that plaintiffs did not pay the taxes for 1947 before they were delinquent, and that this seventh year of taxes were required to be paid before the commencement of the action, and therefore could not recover under the complaint, yet the cross-defendants in the various cross-complaints, and the plaintiffs under their answer to the counter-claim of defendant Olson in his Amen-

ded Answer, should have been given a decree quieting their title for the following reasons:

A.

APPELLANTS PAID ALL TAXES ASSESSED PRIOR TO THE FILING OF THE CROSS-COMPLAINT AND PRIOR TO THE FILING OF THE COUNTER-CLAIM IN THE AMENDED ANSWER.

Appellant Morley Dean redeemed the 1947 and 1948 taxes, and paid the 1949 taxes on December 30th, 1949 (Rec. 81; Plaintiffs' Exhibit J, pages 59 and 61; Tr. 100). There is no dispute about this.

Culbert L. Olson, Cross-Complainant, filed his Cross Complaint on January 9th, 1950 (Rec. 17-20). He continued to file various cross-complaints until his "CROSS-COMPLAINT of Defendant CULBERT L. OLSON", Amending and Replacing His Third Amended Cross-Complaint (Rec. 43-50). In his "AMENDED ANSWER OF CULBERT L. OLSON" (Rec. 12-14), the defendant Olson makes his first counter-claim, and in fact his first answer, alleging in paragraph III on page 2:

> "Further answering, this defendant affirmatively avers that he is the sole owner of said land and every part thereof in fee simple; that he is in possession of said land, and that the plaintiffs, or either or any of them have no right, title, estate or interest in, to or upon said land or any part thereof."

This Amended Answer was filed April 1st, 1950. It was the first Answer that alleged any interest in the particular

land involved in this appeal. In it, the defendant plead for a decree quieting his title.

The plaintiffs and cross-defendants answered the various cross-complaints and the counter-claim in the Amended Answer by setting up a claim of adverse possession and the payment of taxes. The claim of adverse possession and the payment of taxes was not made by plaintiffs and cross-defendants until **after** they had paid all taxes which had been levied and assessed prior to the interposition of the various cross-complaints and amended answer containing the counter-claim.

B.

THE REDEMPTION OF THE 1947 AND 1948 TAXES ON DECEMBER 30, 1949, WAS THE PAYMENT OF TAXES UNDER SECTION 78-12-12 U. C. A. 1953.

The Lower Court held in Conclusion of Law No. 2 (Rec. 102) that plaintiffs could not recover on their complaint for the reason that adverse possession did not begin to run until June 30, 1941, and the plaintiffs had not paid the taxes for the year 1947, which was the seventh year, until after the filing of the complaint. Granting for the sake of argument, that he was right in so doing, the claim that redemption is not the payment of taxes does not go to the original complaint, but applies only to the effect of such redemption made prior to the filing of the cross-complaints and counter-claim.

The record is very clear that the plaintiffs and cross-

defendants paid all of the taxes that were paid between June 30th, 1941, the time the court found adverse possession commenced, and January 9th, 1950, when the defendant Olson filed his first cross-complaint. OLSON PAID NO TAXES DURING THIS PERIOD.

The Lower Court in his Memorandum Decision (Rec. 83) to support his holding under Section 104-2-12 U. C. A. 1953), that the plaintiffs had not "shown that the land has been occupied and claimed for the period of seven years continuously and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law," relied upon the cases of Keller vs. Chournos, 102 Utah 535, 133 P.2d 318, Jenkins vs. Morgan, 113 Utah 534, 196 P.2d 871, Home Owners Loan Corporation vs. Dudley, 105 Utah 208, 141 P.2d 160, and Smith vs. Nelson, 113 Utah 51, 197 P.2d, 132. In all of those cases, the pretended adverser did not pay all of the taxes during the period of adversity, or the record owner had either paid all of the taxes or paid taxes before the period of adverse possession had run.

Our statute governing this situation, Section 78-12-12 U. C. A. 1953 (formerly 104-2-12, U. C. A. 1943), does not require the continuous payment of taxes, but requires that the adverser and his predecessors "have paid all taxes which have been levied and assessed upon such land according to law."

It has already been determined in this state, that re-

demption is the payment of taxes. By way of repitition to confirm this point, we again quote Sorensen v. Bills, 70 Utah 509, 261 Pac. 450, at the bottom of page 451, as follows:

> "The owner of the property, within the period allowed for redemption, had redeemed the property from the tax sale, and thereafter any right that the county had by reason of the levy and the tax in the year 1917 was extinguished to the same extent that its claim would have been had the taxes been paid prior to the delinquent tax sale on December 17, 1917. Such is the plain intent of the statute." Comp. Laws Utah 1917, No. 6024.

Section No. 6024 is virtually the same as Section 59-10-56, U. C. A. 1953.

Section 59-10-1 U. C. A. 1953 (formerly 80-10-1, U. C. A. 1943) provides:

> "Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

Section 59-10-3 (formerly Section 80-10-3, U. C. A. 1943) provides:

> "Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the 1st day of January of each year."

In construing Section 80-10-32, R. S. U. 1933 (which

by amendment became Section 80-10-32, U. C. A. 1943, and is now Section 59-10-33, U. C. A. 1953) in connection with the above quoted sections, this Supreme Court in Western Beverage Co., of Provo, Utah v. Hansen, 98 Utah 332, 96 P.2d 1105, said:

> " 'Sale' and 'sold', as herein used, do not refer to such sale as extinguishes the title of the owner and initiate a new title in the purchaser, either county or otherwise, so as to extinguish the right to redeem, nor prevent revesting of title in the owner upon redemption or the assignee lienholder, upon expiration of the redemption period when assignment of certificate of tax sale has been made to the recorded lien holder."

Most assuredly, under the 1939 amendment, Section 80-10-32, U. C. A. 1943 and the present statute Section 59-10-33, U. C. A., "sale" and "sell" could not be held to divest the delinquent tax payer of his title, as the sale is a "PRELIMINARY SALE."

If then, the redemption puts the owner back in the same position as if he had paid the taxes before sale, then the redemption is the payment of the taxes, and no injury to the owner's rights results from the delinquency.

Attention is also invited to Section 59-10-64 (4), U. C. A. 1953 (formerly Section 80-10-68 (4) U. C. A. 1943), which provides that the county must sell the property on bid at the Auditor's Sale to the person bidding the taxes, penalties, interests and costs who offers said sum for the least amount of property, and states in part:

> "In the event the bid accepted is for less than the entire parcel, the auditor shall note the fact, with a description of the property covered by the bid, upon the tax sale record and the balance of the parcel not affected by said bid shall be deemed to have been redeemed **by the owner thereof.**" (Emphasis ours.)

The statute still considers that the delinquent is the "owner" of the title. No re-conveyance or redemption of this property in the usual form is required. Surely there can be only one conclusion that prior to the Auditor's Certificate required by Section 59-10-64 (6) U. C. A. 1953, the county has no vested title in the property by reason of the preliminary sale, and that its lien is extinguished by the payment of the taxes either before delinquency, by redemption, or by a bid therefor for less than the entire tract.

Under Section 59-10-56 U. C. A. 1953 and all prior statutes thereto, redemption may be made by the **payment of taxes,** penalty, interest and costs. The addition of the words "penalty, interest and costs" does not diminish the force of the "payment of taxes."

The provisions of the statutes are for the benefit of the county and not for the benefit of the defendant and cross-complainant. As long as the county and the taxing districts are satisfied by the payment made by the **taxpayer,** the non-taxpayer Olson cannot show any prejudice.

In Aggelos v. Zella Mining Co., 99 Utah 417, 107 P.2d

170, reference is made to two California cases, namely Owsley v. Matson, 156 Cal. 401, 104 P. 983; and Warden v. Bailey, 133 Cal. App. 383, 24 P.2d 192. In the case of Owsley v. Matson, supra, the court said:

> "But where, as in the present case, the tax has been allowed to become delinquent and a sale has taken place, and, so far as appears, while the party or his successor in interest was in undisturbed possession, and all this is done in good faith, we see no reason why the same should not be held to operate as a payment, and we think it is sufficient to bring the occupant within the terms of the statute which requires him to pay the taxes upon the property claimed."

The lower court held that there was no question about the possession of Morley Dean after his purchase on May 18th, 1947 (Plaintiffs' Exhibit J, page 56), as stated in the Memorandum Decision at page 71 of the Record:

> "There is no question of the use and occupancy of the property since the Dean purchase and possession."

The redemption was made while Dean was in "undisputed possession."

As to the "good faith" of Dean in allowing the taxes to go delinquent and redeeming them, the record clearly shows this "good faith." A decree quieting title to the property involved against the defendant and cross-claimant Olson, was recorded December 2nd, 1946 (Plaintiffs' Exhibit J, pages 51-52). He had received a Warranty Deed for the

property (Plaintiffs' Exhibit J, page 56). He thought he had a marketable title, and any attorney in the area from an examination of his abstract would have given him an opinion to that effect. As a layman, he relied implicitly upon his Warranty Deed and did not think that he stood in the position of an adverser. He has continued in possession right up to the present time. During the possession, and before trial, he has caused the land to be irrigated, has fenced it, and has converted it from a barren sagebrush covered place to a summer pasture in which he pastures 60 head of cattle during the summer (Tr. 96).

In his Memorandum Decision at page 22 thereof (Rec. 84) the Lower Court says:

> "So long as the adverser maintains such possession and **pays** such taxes, the constructive possession of the owner stands suspended. But because he is the title holder, and because his possession is **presumed** in the law, whenever the adverser either fails to maintain his possession in **all** of its elements, or whenever he fails to **pay any** taxes lawfully levied and assessed against the land, by such failure he changes his status from an adverser to that of a mere trespasser, the constructive possession of the legal title holder attaches, and the adverser, if he is to acquire title, must build from that point forward his **seven years** of adversity and payment of taxes."

Paragraph 2 (Rec. 102) of the Conclusions of law reads:

> "That the said plaintiffs' intestate and his predecessors in interest occupied such real property,

openly, exclusively, adversely, notoriously, continuously and under claim of right from June 30, 1941 until the 30th day of November, 1946, but lost their status as adversers and became mere trespassers following such date, because of failure to pay the taxes for the year 1947 as required by law."

From the foregoing it is not difficult to see that the Lower Court intended that the last part of the foregoing sentence should have read "because of failure to pay the taxes for the year 1947 as required by law before they were delinquent."

The Lower Court when this case was argued on the last motions made it clear that his stand was that if an adverse possessor paid his taxes regularly for six years and then let them go delinquent one year, that by such delinquency he would lose all of his adverse rights even though he redeemed the property from sale at a later date, and that he would have to start all over again. If he then held adversely for another six years, and let his seventh year's taxes go delinquent, his adverse possession would again cease and terminate, and again he would have to start over. This could go on for a hundred years and the adverser could never get adverse possession until he had paid seven years taxes each year successively before they were delinquent.

Section 78-12-9 U. C. A. 1953 (formerly Section 104-2-9 U. C. A. 1943) defines what constitutes adverse possession. There is no mention of the payment of taxes being a part of adverse possession.

Section 78-12-12 U. C. A. (formerly Section 104-2-12 U. C. A. 1943) recites:

> "In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes **which have been levied and assessed upon such land according to law."** (Emphasis ours.)

This section provides two subdivisions for the establishment of adverse possession, one being that the property be occupied and claimed for the period of seven years continuously, and the other is that the payment of taxes is a condition precedent to the granting of the decree. No statement is made as to when the taxes must be paid. No statement is made as to the length of time the taxes must have been paid. It has been held by this Supreme Court consistently that the intent of the statute is that seven years' taxes must be paid.

It would seem to the writer that the provision for the payment of taxes has one of two purposes: First, to protect the owner from losing his property by adverse possession as long as he pays taxes; and second, to insure the payment of the taxes to the taxing units as a condition precedent to the granting of the decree quieting title. The defendant Olson did not protect himself by paying any taxes on the property for the years 1933 to 1949 inclusive. He made no attempt to do so. The taxing units have been fully paid by the plain-

tiffs and their predecessors in interest from 1940 to 1949 inclusive, for all taxes which have been levied whether they were assessed according to law or not.

The Lower Court took this statute to mean that the taxes must be paid "as required by law" before the delinquent date each year consecutively. Appellants can read no such meaning into this statute. We have been unable to find any cases supporting the Lower Court's holding that delinquency in the payment of taxes results in the cessation of adverse possession even though the taxes are later redeemed by the adverser except in states which have a statute requiring such payment as does New Mexico as set forth in McGrail v. Fields, 203 P.2d, 1000. The Lower Court quoted this case in his Memorandum Decision as controlling. The statutes are entirely different.

C.

AGAINST THE COUNTERCLAIM AND CROSS-COMPLAINT OF DEFENDANT OLSON, PLAINTIFFS AND CROSS-DEFENDANTS CAN RELY UPON THE REDEMPTION AND PAYMENT OF TAXES ON DECEMBER 30th, 1949.

On page 15 of his Memorandum Decision (Rec. 77), it is held:

> "On December 30, 1949, all delinquent taxes, interest, penalties and costs were paid by 'J. Parry Bowen by Morley Dean,' (the latter having succeeded to the County's Rights on May 8, 1947,) and a Redemption Certificate was issued. Pay-

ment of such taxes is mandatory if an adverse claimant is to obtain title."

As heretobefore shown in the next preceding subdivision of this brief, the redemption of the taxes on December 30th, 1949, for the years 1947 and 1948, and the payment on said date of the 1949 taxes, constituted a payment of taxes within the meaning of the statute as set forth in Sorensen v. Bills, supra. As previously set forth, this redemption related back and had the same effect as if the taxes were paid before delinquent. However, even though this were not the case, the taxes were paid before the filing of the Cross-Complaint (Rec. 17-20) on January 9th, 1950, and the filing of the counter-claim (Rec. 12-14) on April 21st, 1950.

In Rowley v. Davis, 34 Cal. App. 184, 167 Pac. 162, the court said:

> "Referring to the record thus presented, appellant insists that the judgment should be reversed, because the action must be determined upon the facts as they existed at the time of the commencement of the suit; 'Rowley not having pleaded any after-acquired title.' It is true that the plaintiff did not attempt to supplement his complaint by a statement showing title acquired after the action was commenced; also it is the law that he would not have a right to file a supplemental complaint showing after-acquired title, if in fact he had no title at the commencement of the action. Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 668, 161 Pac. 116, L. R. A. 1916D, 676, note. But the cross-complaint of the defendant Davis was

not filed until after plaintiff Rowley, had acquired the title of the defendant and cross-defendant Alice Huse. By filing that cross-complaint the cross-complainant tendered new issues, whereby he set up a cause of action which relates to the date of filing the cross-omplaint. This he had the right to do. Johnson v. Taylor, 150 Cal. 201, 208, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. The fact that Rowley had at that time acquired the title of Mrs. Huse was available to him as a defense to the cross-action, and was provable under his claim of ownership as pleaded by his answer to the cross-complaint. If this were not so, a defendant by filing a cross-complaint would be able to prevent the plaintiff from dismissing an action which had been prematurely brought, and might thereby obtain 'on the merits' a judgment which possibly would permanently cut out the just rights of the plaintiff, by preventing him from thereafter litigating the title with the cross-complainant. We therefore are of the opinion that the judgment should be sustained, if the evidence is sufficient to support Rowley's title as existing at the time of filing the cross-complaint."

The above case is quoted with approval in Meagher v. Uintah Gas Co., supra, although in a manner not applicable here.

Section 78-12-5 U. C. A. 1953 (formerly Section 104-2-5 U. C. A. 1943) provides:

> "No action for the recovery of real property or for the possession thereof shall be maintained, unless it appears that the plaintiff, his ancestor, grantor or predecessor was seized or possessed of the property in question within seven years before the commencement of the action."

Section 78-12-6 U. C. A. 1953 (formerly Section 104-2-6 U. C. A. 1943) provides:

> "No cause of action, or defense or **counterclaim** to an action, founded upon the title to real property or to rent or profits out of the same, shall be effectual, unless it appears that the person prosecuting the action, or interposing the defense or **counterclaim,** or under whose title the action is prosecuted or defense or **counterclaim** is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense or **counterclaim** made." (Emphasis ours).

Applying this to the present action would make it read like this:

> "No counterclaim to an action, founded upon the title to real property or to rents or profits out of the same, shall be effectual, unless it appears that the person interposing the counterclaim, or under whose title the counterclaim is made, or the ancestor, predecessor or grantor of such person was seized or possessed of the property in question within seven years before the committing of the act in respect to which such counterclaim is made."

In other words, the statute runs up to the time of the interposing of the counterclaim, the act in the counterclaim being the claim of title and possession on the part of the defendant.

The Amended Answer of Culbert L. Olson (Rec. 12-14), sets out his counterclaim in paragraph III as follows:

> "Further answering, this defendant affirmatively avers that he is the sole owner of said land and every part thereof in fee simple; that he is in possession and is entitled to the possession of said land, and that the plaintiffs, or either or any of them have no right, title, estate or interest in, to or upon said land or any part thereof."

This counterclaim was not interposed until April 21st, 1950.

The plaintiffs in the original complaint did not allege adverse possession or limitations. In their answer to the cross-claim in the amended answer (Rec. 15-16) plaintiffs set up adverse possession and the payment of taxes, in addition to the two above quoted limitation statutes as a defense to this counterclaim.

The defendant Olson made no reply to the affirmative matter to the "Answer to Cross-Claim, in Amended Answer" (Rec. 15-16).

The actual fact is that the case was tried upon the issue raised by the counterclaim in the amended answer, and the answer thereto setting up adverse possession and the payment of taxes, as well as limitations and laches. Judgment was to the effect that the plaintiffs could not recover on their complaint and that the defendant have judgment of no cause of action thereon. Judgment was given to Olson on his counterclaim by the Conclusion of Law 4 (Rec. 103).

We invite the attention of this Supreme Court to the

discussion in the case of Welner v. Stearnes, 40 Utah 185, 120 Pac. 490. At page 497 of the Pacific Reporter it is said:

> Taking either horn of the delimma, therefore, we cannot see how Borg can successfully contend that the statute of limitations did not run against him. Counsel have not been able to find any case directly in point, and after a most diligent search we have been unable to do so. We are firmly convinced, however, that, both in reason and upon principle, the appellant, under the undisputed facts, should prevail in this case. Our statute relating to adverse possession should be given a fair and reasonable application by the courts. In applying the statute, courts should aim to protect the substantial rights of all of the parties interested in the subject of action, and where the statutory time has fully elapsed, and the claimant in possession has complied with the provisions of the statute, the title to the property is vested in him, the same as though he had the most formal title deed. In this case the question is not one of dispute or conflicting facts. In our judgment, the trial court erred in his application of the law to the undisputed facts. Under such circumstances, we have quite as good an opportunity to determine the result as had the trial court. In our judgment, the findings of fact, conclusions of law, and decree are clearly against both the law and the evidence."

While judgment was denied the plaintiffs on their complaint, we think the ruling in Welner v. Stearns, supra, applies with full impact to the counterclaim. Section 78-12-6, U. C. A. segregates "defense or counterclaim", and in litigation based upon the counterclaim upon which judgment is given, the statute is not tolled until the "interposi-

tion" of the counterclaim. At the time of the "interposition" of the counterclaim in this case, the taxes had been fully paid by the plaintiffs up to and including the year 1949. While plaintiffs may not have been entitled to judgment on the complaint (which they do not admit), they are entitled to judgment on the counterclaim of the defendant. Rowley v. Davis, supra.

In fact, the Lower Court on granting judgment on the counterclaim, awarded to plaintiffs judgment for the taxes paid on December 30th, 1949 (Rec. 106). If the Lower Court gives plaintiffs judgment for the payment of taxes, how can he in the same breath say that plaintiffs lost the action for failure to pay those very taxes?

As to the defendant being barred by limitations, his testimony from pages 3 to 23 of the transcript clearly shows that he took no interest in this property at all from 1932 to the late fall of 1949, when he was served with summons. He made no contacts with the property during that period. On September 19th, 1949, he wrote a letter in which he stated (Tr. 16; Plaintiffs' Exhibit F):

> "I do not know at this time what interest I still have in the land in Uintah County."

Plaintiffs Exhibit H, dated December 22, 1949, a letter from defendant Olson, states:

> "Furthermore, I think I shall be able to prove that my agents were in possession before that date and all during the years of the tax delinquency under lease agreement to pay those taxes; **that**

they purposely permitted the taxes to become delinquent and were parties in interest in the sale made by the County." (Emphasis ours.)

Plaintiffs' Exhibit I, dated March 21st, 1950, a letter from defendant Olson, makes the statement that he had leased this land and other parties were to pay the taxes on it.

However, in his testimony (Tr. 3-22) he repudiates all of these letters, except his first statement, and tries to set up an agency with C. I. Johnson and another with Ercil Johnson. His first statement that he did not know what interest he had in the property is the correct one.

For more than eight years after the Lower Court held that the plaintiffs and their predecessors had commenced adverse possession on June 30th, 1941, the defendant paid no attention to his property.

In Hammond v. Johnson, 92 Utah, 211, 94 Utah 20, 66 P.2d 894, it is said:

> "It is elemental that an interruption of adverse user by the owner must be actual and not merely declarations or verbal protests. * * * Such interruption of the adverse claimant's occupancy or user, to stop the running of the statute, must be of the same definite character as must the adverse claimant's possession and user be to start the statute running. The interruption must be open, notorious, and under claim of right such as to manifest an intention to repossess the property and dispossess the occupant, and be a challenge to his right and dominion. It must bear on its face

an unequivocal intention to take possession. Smith v. Southern Pac. R. Co., 1 Cal. (2d) 272, 34 P.2d 713, Bonebrake v. Flourney, 133 Okl. 101, 271 P. 658; 2 C. J. p. 96; Nelson v. Johnson, 189 Ky. 815, 226 S. W. 94.

Under the Lower Court's ruling that adverse possession commenced June 30th, 1941, and that adverser must pay taxes, defendant Olson in order to interrupt the adverse possession, must come in before June 30th, 1948 and take possession and pay taxes or the adverse possession becomes complete upon the paying of the taxes by the adverser.

While the case of Hammond v. Johnson, supra, is a water case, the cases cited are real property actions and the rule quoted applies with like effect to real property actions.

V.

DEFENDANT AND CROSS-COMPLAINANT OLSON IS BARRED BY LACHES FROM ASSERTING HIS ANSWER, CROSS-COMPLAINTS AND COUNTER-CLAIM.

The case of Petterson v. Ogden City, 111 Utah, 1925, 176 P.2d 599, states:

> "Laches: 'is a negative equitable remedy, closely related in its nature and objective with estoppel, which deprives one of some right or remedy to which he would otherwise be entitled, because his delay in seeking it has operated to the prejudice of another.' 2 Lawrence on Equity Jurisprudence 1121. See 19 Am. Jur. 338-343."
>
> "Both laches and estoppel are bars which in certain circumstances may be raised to defeat a right

> or claim a party otherwise would have. The courts refuse to give their aid to the party who has slept on his rights or who because of his actions or inaction when action was required is not fairly entitled to relief."

When the Abstract of Title (Plaintiffs' Exhibit J) was forwarded to the defendant Olson in December 1949, it contained the Oil and Gas Leases shown at pages 39 and 40 and 53 and 54. It also contained the Tax Sale shown at page 60. He was told on December 7th, 1949 in a telephone conversation that there was an oil well drilling "about nine miles" distant from this land (Tr. 260).

As set forth in the next preceding argument, defendant Olson went completely to sleep insofar as this land was concerned between 1933 and 1949, and took no personal interest in this land. He did not see the land between 1915 and 1950 (Tr. 257).

Then all of a sudden after finding out there were oil leases on the land and wells were drilling in the vicinity, he takes an especial interest in the land. He has spent considerable time here in Utah in connection with this law suit. Taking the value of the land for its normal uses into consideration, he has already spent more money than the land could be sold for when used for such purposes, many times over.

Morley Dean has improved the land considerably as heretofore shown. He has spent considerable money upon it. When he bought the land there was a Decree Quieting

Title of record and he received a Warranty Deed as heretofore shown. Likewise, as heretofore shown, he can now pasture 60 head of cattle during the summer upon this land.

In the case of Livermore v. Beal et.al. (four cases), 64 P. 2d 987 (Cal App.) the court said:

> "It was also further held that the statute of limitations did not control equity in applying the principle of laches.
>
> "In view of the fact of the change in the value of lands by reason of the discovery of oil or gas therein, the language of Justice Brewer, quoted in the case of Troll v. City of St. Louis, 257 Mo. 626, 168 S. W. 167, 175, and approved in the Grossman Case, is applicable here to wit: 'No doctrine is so wholesome, when wisely administrated, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claiment that he make known his claims. It gives to the actual and longer possesor security, and induces and justifies him in all efforts to improve and make valuable the property he holds,' etc. Or, in other words, one is not permitted to stand by while another develops property in which he claims an interest, and then, if the property proves valuable, assert a claim thereto, and, if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language: 'if the property proves good, I want it; if it is valueless, you keep it."

In this case, the Lower Court is barring the plaintiffs from recovering on the ground that they did not pay the

1947 taxes before they became delinquent on November 30th, 1947, and not on the ground that they were not paid by the plaintiffs. The lower court found that plenty of time for adverse possession had elapsed. The plaintiffs did pay the taxes. Defendent Olsen was served with summons before the 1947, 1948 and 1949 taxes were paid, and if he had been so anxious about the payment of the taxes, he could have paid them himself before Dean paid them on December 30th, 1949. Can he be excused from not paying these taxes to interrupt the adverse possession of Dean, when the law requires him to pay them if he is to keep his title, and then take the property away from Dean after payment has been made by Dean? We think the answer is obvious.

VI.

THE LOWER COURT MADE SOME MINOR ERRORS IN HIS FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

In many cases in the Findings of Fact, Conclusions of Law and Decree (Rec. 101-107), the Lower Court uses the words "plaintiff's intestate," "plaintiff administratrix," "she," "her" and other designations to indicate Frances H. Bowen as Administratrix of the Estate of J. Parry Bowen, Deceased. J. Parry Bowen conveyed all of his interest in the subject lands to Keith J .Bowen on April 26th, 1947 (Plaintiff's Exhibit J, page 55). The deceased had no interest in the property at the time of the filing of this action on September 22nd, 1948.

Further, in finding 9, on page 100 of the record, in the second line the words "during the summer of 1941" should read "about March 20th or 21st of 1941" as shown in the Memorandum Decision, page 7, line 8. (Rec. 69).

CONCLUSION.

Plaintiffs contend that they should have judgment for the following reasons:

1. That they had open, notorious, peaceable and continuous adverse possesion from September 30th, 1940, to January 9th, 1950, and paid all taxes which were levied and assessed according to law during that period.

2. That defendent had no possession during the period set forth above and paid no taxes during said period, and is barred by limitations and laches from recovering.

3. That the lower Court erred in carrying his findings of fact insofar as the legal effect of such findings of fact are concerned from his Morandum Decision into his Findings of Fact, Conclusions of Law, and Decree.

4. That the Findings of Fact, Conclusions of Law and Decree are contrary to law.

Respectfully submitted,

GEORGE B. STANLEY
COLTON & HAMMOND

Attorneys for Plaintiffs
Cross-Defendants and
Appellants.